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IN THE

Supreme Court of the United States

October Term 1964

ROSS BIGGERS, ET AL., *Petitioners*

v.

CITY OF HOUSTON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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CITY OF HOUSTON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, which reversed the judgment of the County Civil Court at Law No. Two of Harris County, Texas. The judgment of the County Civil Court at Law No. Two of Harris County, Texas overruled the Respondents' Motion to Dismiss the condemnation suit following the return of a jury verdict in the sum of One Million One Hundred Fifty-Seven Thousand Six Hundred Fifteen and No/100 ($1,157,615.00) Dollars as

compensation to the Petitioners for taking the real property here involved and transferred title to Petitioners' property to the City of Houston, Texas. Prior to the institution of condemnation proceedings, the City of Houston had passed a prohibitory and confiscatory Ordinance restricting the use of Petitioners' land. Petitioners' property comprising some three acres of land is located in downtown Houston, Texas, and is completely surrounded by city owned property. The City of Houston held this land under such restrictive and confiscatory Ordinance for a period of some three and a half years prior to the time condemnation proceedings were instituted. The Court of Civil Appeals held that Petitioners had not been prejudiced by the action of the City and the trial court erred in overruling the Motion of the City to dismiss the action. The Court of Civil Appeals held that Petitioners' property had not been taken by the action of the City in passing the above described Ordinance and by holding Petitioners' land under the provisions of said Ordinance for the period of time above stated. Petitioners submit that said property was taken from them without due process of law and without just compensation, such taking being prohibited by the Fifth Amendment to the Constitution of the United States of America and by the Fourteenth Amendment to the Constitution of the United States of America.

OPINION BELOW

A copy of the judgment of the County Civil Court at Law No. Two of Harris County, Texas, entered without written opinion, is copied herein as Appendix A. The Opinion of the Court of Civil Appeals, which is recorded as City of Houston, *Appellant v. Ross Biggers*, et al, Ap-

pellees, _____ S.W.2d _____, is copied herein as Appendix B. The Order of the Court of Civil Appeals Overruling these Petitioners' Motion for Rehearing was entered without written opinion. The Order of the Supreme Court of Texas denying these Petitioners' Application for Writ of Error and its Order Denying Petitioners' Motion for Rehearing of Application for Writ of Error were each entered without written opinion.

JURISDICTION

The Order of the Supreme Court Refusing the Petitioners' Application for Writ of Error to the Court of Civil Appeals for the First Supreme Judicial District of Texas was dated and entered on October 7, 1964, and Petitioners' Motion for Rehearing on such Application for Writ of Error was overruled by the Supreme Court of Texas on November 18, 1964. The decision and judgment of the Court of Civil Appeals was dated and entered on June 11, 1964 and the Motion for Rehearing of Petitioners was filed in the Court of Civil Appeals within fourteen (14) days thereafter on June 26, 1964. The Order of the Court of Civil Appeals Overruling Petitioners' Motion for Rehearing was dated and entered on July 9, 1964, and Petitioners' Application to the Supreme Court of Texas for Writ of Error was filed within thirty (30) days therafter on August 7, 1964.

The action of the Supreme Court of Texas in refusing Petitioners' Application for Writ of Error and refusing to review the decision and judgment of the Court of Civil Appeals constituted the judgment and decision of the highest court of the State of Texas, and the final decision which

can be had, and therefore a judgment reviewable under 28 U.S.C. §1257(3). *Sullivan v. Texas,* 207 U.S. 416; *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157. The date, however, when the judgment and decision of the Court of Civil Appeals became final was November 18, 1964, when the Supreme Court of Texas overruled Petitioners' Motion for Rehearing on Application for Writ of Error. *American Railway Express Co. v. Lavee,* 263 U.S. 19; *Adam v. Saenger,* 303 U.S. 59.

The judgment of the County Civil Court at Law No. Two is a "final judgment" within the meaning of 28 U.S.C. §1257(3) because it has been finally adjudicated in the state courts that the condemnation action should be dismissed. While the action was ordered to be dismissed by the Court of Civil Appeals and this order transmitted to the County Civil Court at Law No. Two, and the mandate stayed by order of the court, the jurisdiction issue and the federal peremption issue have not been finally adjudicated because of the action of the court has attempted to perempt a right, title and privilege especially set up under the Constitution and the Amendments thereof, of the United States of America, specifically Amendments Five and Fourteen thereof, which guarantee Petitioners that they shall not be deprived of property without due process of law and without just compensation being paid therefor. The jurisdiction of this court is therefore invoked under 28 U.S.C. §1257(3) since the validity of the action of the Court of Civil Appeals for the First Supreme Judicial District of Texas as applied in this action is drawn in question on the ground of its being repugnant, as applied in this action, to the Constitution and laws of the United States.

QUESTIONS PRESENTED

The suit of the City of Houston, Texas sought to condemn Petitioners' property. Prior to the institution of condemnation proceedings the City passed a restrictive, prohibitory and confiscatory Ordinance restricting the use of Petitioners' property, which said Ordinance was not a jurisdictional prerequisite to the institution or prosecution of condemnation proceedings. The City of Houston caused such Ordinance to be recorded in the Deed Records of Harris County, Texas, and waited approximately 3-½ years thereafter to actually file its Petition in Condemnation thereby instituting condemnation proceedings against the Petitioners seeking to acquire such property by eminent domain proceedings. Under Texas decisions, such proceedings may not be dismissed after the return of a jury verdict therein, if the proceedings have resulted in prejudice to the landowners' interests and property rights. Neither can the suit be dismissed where the use of the property has been so restricted by the action of the condemning authority so as to constitute a taking of such property within the meaning and terms of the Constitution of the United States of America and the restriction of such property and its use by such action over a long period of time and is a taking of Petitioners' property without due process and with just compensation to them.

Furthermore, Petitioners consider it a certainty that their property will ultimately be condemned as a part of the Civic Center and that they will never be allowed to develop the land. They, therefore, prefer to have the trial court's verdict affirmed.

The questions here presented in connection with this action are as follows:

(1) Can the City of Houston, Texas pass an Ordinance completely prohibiting improvements of property and directing its agents and servants to refuse to issue building permits for any structure thereon or for the repair (other than minor repairs) of existing structures on said property where such prohibition does not serve or promote the health, safety, morals or public welfare of its citizens, without violating the constitutional guaranty against the taking of private property without due process of law and without just compensation therefor?

(2) Can the City of Houston, Texas pass a restrictive and confiscatory Ordinance which prohibits the issuance of building permits to repair (other than minor repairs) existing structures or to build new structures within a certain defined area, and cause same to be recorded in the Deed Records of Harris County, Texas, for the purpose of holding down real estate values in such area and maintain said Ordinance for a period of 3-½ years prior to filing its condemnation proceedings, when such Ordinance does not serve the public health, safety, morals or welfare of its citizens, without infringing the constitutional guaranty against the taking of private property without due process of law or without just compensation?

(3) Can the City of Houston, Texas, by passing such a restrictive ordinance, "freeze" a landowner's property for so long a time and make him pay taxes on said property while denying him use of his property to produce income to help defray the taxes, or prevent the sale, lease or other use of said property without violating the guaranty against the taking of private property without just compensation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

These Petitioners invoked the Fifth Amendment of the Constitution of the United States, which provides:

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

And the Fourteenth Amendment to the Constitution of the United States, Section I; which provides:

> ". . . nor shall any State deprive any person of . . . property, without due process of law".

STATEMENT OF THE CASE

On the 23rd day of September, 1958, the City Council of the City of Houston passed Ordinance No. 58-1033, determining that: "Public necessity and convenience required the designation and protection of the Civic Center", thereby designating the building lines for the Civic Center. (It is uncontroverted that the 128,520 square feet of land belonging to Petitioners is included within said boundaries). Said Ordinance additionally provided that within said area "no structures shall be permitted to be built". The Ordinance further provided and directed the Director of the Department of Public Works and Engineering to refuse and deny any building permits for any new structures, and the Ordinance further directed the City Secretary to file a certified copy of record with the County Clerk of Harris County, Texas. The Ordinance was filed at Volume 3572, Page 85, of the Deed Records of Harris County, Texas

(S.F. 1, p. 3, 11. 19-25; p. 4, 11. 1-3) (S.F. 6, pp. 6-8) (Tr. pp. 109-112). Thereafter, the Ordinance was amended on various occasions but included the Biggers property in its designation and contained the same prohibitory provisions above described (S.F., pp. 8-11).

After the return of a jury verdict in this cause an Ordinance was passed on the 17th day of April, 1963, purporting to amend the original Ordinance and excluding Petitioners' property therefrom (S.F. 6, p. 12). Approximately 3-½ years following the passage of Ordinance No. 58-1033, the provisions of which are above described, the Respondent filed a statement in condemnation seeking to condemn Petitioners' property for the Civic Center (Tr. pp. 3-7). The jurisdictional prerequisites having been filed by the City, a trial by jury in the Civil Court at Law No. Two of Harris County, Texas began on March 26, 1963 and ended March 29, 1963 (S.F. p. 1). A jury verdict of One Million One Hundred Fifty-seven Thousand Six Hundred Fifteen and No/100 ($1,157,615.00) Dollars was returned on Friday, March 29, 1963 (Tr. pp. 29-30). The City Council on April 3, 1963, authorized the City Attorney to "dismiss this suit as soon as possible and to prepare an Ordinance eliminating this property from the Civic Center".

At the time Ordinance No. 58-1033 was passed in 1958, the only structure that existed on Petitioners' property was a small building built in 1939 in which Petitioners operated their business (S.F. 6, pp. 28-29). Such building only occupied 3-½% of the total area of the land, and building together with a small parking lot comprised only 5% of the area, (a total of 128,520 square feet), the remainder of

the tract being unimproved. The Civic Center Ordinance prevented the use of 95% of such tract (S.F. 6, p. 30) (S.F. 6, pp. 32-34-36).

The witnesses Robert L. Hatchett, Jr., (S.F. pp. 2-6), W. Gail Reeves (S.F. pp. 10-19) and Y. Frank Jungman (S.F. pp. 19-24), all testified that during the time the Civic Center Ordinance was in effect, they undertook to negotiate with Petitioners for the purchase of the property here involved to erect a high-rise apartment building, but upon learning of the Civic Center Ordinance designating the property for condemnation for the Civic Center and prohibiting building thereon, they withdrew from any further negotiations because they did not want the property, or their clients did not want the property under those conditions.

The witness H. E. McCants (S.F. 5, pp. 6-10) testified that he represented a large outdoor sign company which specialized in electrical display advertising signs such as are found abutting traffic freeways in Houston, Texas, and except for the Civic Center Ordinance prohibiting erection of new structures on the Biggers' property, he would have some four years previously, erected a large electrical display sign on such property and paid Petitioners therefor the sum of $500.00 per month rental for sign space. His company would not enter into such an agreement because of the Civic Center Ordinance passed by the City in 1958.

Mr. Ross Biggers, one of the Petitioners herein, testified that he was aware of the Civic Center Ordinance passed in 1958, and of the terms and provisions of that Ordinance. Since the date the Ordinance was passed he had numerous

opportunities to negotiate for the sale of the subject property (as testified by the witnesses Hatchett, Reeves and Jungman) and in addition to those persons he had other opportunities to sell the property as an apartment site for a high-rise apartment project. He further testified that he was unable to proceed with any such negotiations or sale because no prospective buyer would purchase the property with the restrictions of the so-called "Civic Center Ordinance" imposed thereon and the designation of the property by such Ordinance for Civic Center purposes. The witness Biggers further testified that in 1961 during the time the City was negotiating with Petitioners for the purchase of the property he received a letter from the Director of the Department of Real Estate of the City of Houston informing him that the property had been excluded from the Civic Center, following which he undertook negotiations again to sell the subject property.

Later, having read an article in the newspaper to the effect that the Council was discussing acquiring this property, Petitioner and his brother went before the City Council to request an explanation of the letter which seemed contrary to such newspaper article. The City Council then advised Petitioners that they were going to condemn this property. Petitioners later learned that this property had never been removed from the Civic Center Ordinance when the Director of Real Estate wrote them the above letter advising them that the property had been excluded. This witness further testified that during the five years preceding the trial of this case, because of the Civic Center Ordinance and actions on the part of the City, he had not been able to develop the property and had not

had the benefit of any income from the property due to the Civic Center Ordinance, although the City increased taxes on this property to the extent of 3,100% (S.F. 5, pp. 40-55) (S.F. 6, pp. 28-39).

There is no testimony or evidence in this record on the part of the City of Houston tending to prove or to explain how this Ordinance served the public health, safety, morals or served the public welfare of the citizens of Houston, Texas rather than being an Ordinance solely designed to hold down real estate values in the areas so designated until such time as the City, if ever, got around to filing condemnation proceedings against the owners of the property within such designated area.

The Honorable Court of Civil Appeals on Page 4 of its Opinion held that the rule was well settled in Texas that a condemnor may elect to dismiss a condemnation proceeding at any time prior to judgment if there has not been a taking of possession of the property, actual or constructive, under an order in a condemnation proceeding or under an agreement with the condemnee pending the proceeding. On Page 5 of its Opinion the Honorable Court of Civil Appeals also held that:

> "The passage of the Ordinance including the land and what was contemplated as a Civic Center did not, as Appellees contend, constitute a taking. The act was purely legislative and could be changed at any time. Even though it might have, as a practical matter, interfered with the marketability of the property, it would cause but an incidental damage which is not compensable."

Petitioners have continually urged that the passage of the Civic Center Ordinance and the restrictions thereby imposed upon Petitioners for the long period of time which they were imposed, constituted a taking of Petitioners' property for a public purpose and that the dismissal of the lawsuit following the rendition of a jury verdict did not justly compensate them for such taking. Further, the passage of the Civic Center Ordinance in itself being unreasonable, arbitrary and capricious, was an exercise of the police power of the City of Houston, which did not serve the health, safety, morals or public welfare of the citizens of the City of Houston, and therefore, took their property without due process of law.

REASONS FOR GRANTING THE WRIT

Although Respondent has not in any court explained how the passage of the Civic Center Ordinance served the public health, safety, morals or welfare of the citizens of Houston, Texas, it consistently takes the position that such Ordinance was a valid exercise of police power and that no prejudice has resulted to Petitioners by the reason of the passage and enforcement of such Ordinance, even though such Ordinance was not a necessary prerequisite to the jurisdiction of the court in this cause. The courts of Texas and sister jurisdictions together with the federal courts have held time and time again that an unjust, unreasonable, arbitrary and capricious exercise of police power that interferes with the property rights of the landowners will and does constitute a taking of such property without due process of law and without just compensation as prohibited by law.

The Honorable Court of Civil Appeals in this case held that there could be no "taking" nor could there by any prejudice resulting for the landowner in the absence of actual or constructive possession of the property on behalf of the City of Houston, Texas. It stated in its judgment:

> "The passage of the Ordinance including the land in what was contemplated as a Civic Center did not, as Appellees contend, constitute a taking. The act was purely leglislative and could be changed at any time. Even though it might have, as a practical matter, interfered with the marketability of the property, it would cause but an incidental damage which is not compensable."

After having noted on Page 4 of the judgment that:

> "Appellees' position is that because of the facts detailed the court was correct in overruling the motion to dismiss. The foundation for such is their contention as follows:
>
> 1. The passage of Ordinance No. 58-1033 and its continuance in force until the ordinance of April 24, 1963, effected a 'taking' of the property.
>
> 2. They would be prejudiced because they had been unable to negotiate for the sale or additional use of the property that might entail additional structures."

Petitioners submit that the facts in this case show a substantial interference with the use of their property and that the passage of the Civic Center Ordinance itself, being legislative in nature, was in itself an attempt by legislative fiat to appropriate and restrict the use of Petitioners' property to the benefit of the City of Houston, Texas.

POINT ONE

The Texas Court of Civil Appeals has decided a question in a way contrary to the known judicial expressions of the Supreme Court of the United States holding that an unreasonable, arbitrary, and capricious interference with the use of Petitioners' property by the City of Houston did not constitute an unauthorized exercise of the police power on the part of said City and therefore, a taking of their property without due process of law, compensation being paid therefor.

POINT TWO

It is not lawful for the City of Houston to pass a restrictive Ordinance restricting the use of Petitioners' property in response to the City Council's request, for the purpose of depressing the land values and preventing a higher and better economic use of Petitioners' property, preliminary to some future eminent domain proceedings by the City of Houston to acquire the property for its Governmental uses, and the City of Houston in doing so effected a taking of Petitioners' property without due process of law and without just compensation paid to Petitioners.

ARGUMENT AND AUTHORITIES UNDER POINTS ONE AND TWO

We believe the Honorable Houston Court of Civil Appeals erred in holding in its Opinion that the right of dismissal of a condemnation suit would be denied only where the condemning authority had acquired actual or con-

structive possession of the property sought to be condemned. It should be noted that in *Brazos River Conservation & Reclamation Dist. v. Allen,* 141 Tex. 208, 171 S.W. 2d 842. 845 (S.Ct. 1943); *Thompson v. Janes,* 151 Tex. 495, 251 S.W.2d 953 (S.Ct.); and *Lower Nueces River Water Supply Dist. v. Cartwright,* 328 S.W.2d 752 (S.Ct), the Texas Supreme Court has never said, as the Houston Court of Civil Appeals said in its Opinion, that the only legal "prejudice" that can occur to a landowner in a condemnation proceeding, which would justify denying condemnor's motion to dismiss, would be the acquisition of actual possession or the right to possession of the property under condemnation. Indeed, in announcing the rule of law to be applied, the Texas Supreme Court did not use the term "possession" but used the term "prejudice". In *Brazos River Conservation & Reclamation Dist. v. Allen,* supra, the Texas Supreme Court stated:

> "Condemnor has the right to correct its errors, to dismiss its proceeding for condemnation, to abandon the purpose of taking the land, but it may not exercise any of these rights to the prejudice of the landowner."

In the case above cited the condemnor had acquired constructive possession by flooding the landowner's property. Too, in *Thompson v. Janes,* supra, and *Lower Nueces River Water Supply Dist. v. Cartwright,* supra, the Supreme Court denied the condemning authority the right of dismissal where it had acquired actual or constructive possession of the premises, stating that the right of dismissal should not be exercised to the prejudice of the condemnee.

It is interesting to note that in the cases cited by the Court of Civil Appeals in its Opinion to the effect that

physical invasion or actual or constructive possession by the condemnor is a necessary element to justify the denial of the right of dismissal by condemnor, the Texas Supreme Court has not placed such limitations on its language, "may not exercise the right of dismissal to the prejudice of the landowner", even though the Court had before it in those cases an actual "possession" or "constructive possession" fact situation. It would seem that if it was the intention of the Supreme Court to so limit such language, or to so limit the term "prejudice" to only those situations where actual or constructive possession had been obtained, the Court would have so stated. Instead, we find the pronouncement made in *Brazos River Conservation & Reclamation Dist. v Allen*, supra, that "a condemnor had the right to correct its errors, to dismiss its proceedings for condemnation, to abandon the purpose of taking the land, but it may not exercise any of these rights to the prejudice of the landowner." The Court *did not say* "it may not exercise any of these rights only when it has acquired actual or constructive possession of the property."

If the term "prejudice" had no well defined legal meaning it might be said that it was merely dicta or that it was merely general terminology used by the Court when the Court really intended to limit the denial of the right to dismissal to the actual or constructive possession situation. Since the term has been used by the Supreme Court in almost all of the cases cited by the Houston Court of Civil Appeals in its Opinion, it follows that the use of it is not a mere inadvertence on the part of the Texas Supreme Court or the particular Justice writing the Opinion, but that the term "prejudice" was used because it has a broader legal significance than does the term "possession".

The term "prejudice", as used in this legal sense, has a well defined meaning. According to Black's Law Dictionary, 3rd Ed., (1933), p. 1402, "prejudice" means "injury, loss, or damnification, anything which places a party in a more unfavorable position." The rationale of the rule is that the condemnor has proceeded so far toward condemning the property and has placed the condemnee in such an unfavorable position, that it would be unconscionable to permit the condemnor to abandon the proceeding. Why then limit the right to a situation where there has been actual or constructive possession by the condemnor? There well may be situations where the landowners' position may be more unfavorable by reason of physical damage, monetary loss, damages by reason of interference with legal property rights, or injury, than there would be from the mere legal right to possession where no actual possession has occurred, or even where actual physical possession has occurred but no physical changes have been made by the condemnor. To say, therefore, that dismissal will be denied only where actual or constructive possession of the property has been taken, is not a practical or reasonable approach to the problem of determining when the landowner will be afforded relief from the harsh results of the harsh remedy of condemnation.

The Texas Supreme Court has followed the Supreme Court of the United States and other sister jurisdictions as noted in the case of *City of Corpus Christi v. Allen*, 152 Tex. 137, 254 S.W.2d 759 (1953); Judgment affirmed 247 S.W.2d 130, when it held that an ordinance which interfered with the legal and proper use of property by the landowner or on the part of the City of Corpus Christi was a "taking" within the meaning of the Constitution.

There, no actual or constructive possession was obtained by the city nor was there any physical invasion of the landowner's property. Plaintiff had, prior to the passage of the zoning ordinance by the City of Corpus Christi, operated a business on his premises. After the passage of the zoning ordinance the city brought suit against defendant to restrain him from continuing his business. Judgment was rendered for the city and the defendant appealed and the judgment as reformed was affirmed. The precise question was clearly before the Court as to whether the enforcement of the ordinance was an unreasonable exercise of police power and, therefore, the taking of property without due process of law. The Texas Supreme Court, in holding such unwarranted exercise of police power was a taking without due process of law, stated on Page 761:

> "Since the non-conforming uses here sought to be enjoined are not shown to constitute nuisances, and do not appear to be harmful in any way to public health, safety, morals, or welfare, we conclude that to invoke petitioners' ordinance to compel respondents to cease operating their business or to move them to another district would be an unreasonable exercise of petitioners' police power and would constitute a taking of their property . . ."

The Houston Court of Civil Appeals in its Opinion observed that the Civic Center Ordinance was purely legislative and could be changed at any time. It should also be noted that in *City of Corpus Christi v. Allen*, supra, that ordinance was also purely legislative and could be changed at any time. The Texas Supreme Court in *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex.

148, 158 S.W. 164 (1913), quoted Judge Stayton's opinion in the Texas Supreme Court's opinion in *Gulf, C. & S.F.R. Co. v. Fuller,* 63 Tex. 467, as follows:

> "The word 'property', as used in the section of the Constitution referred to, is doubtless used in its legal sense, and means not only the thing owned, but also every right which accompanies ownership and is its incident." (Emphasis supplied.)

It is the position of Petitioners that if the acts of the City over the five year period interfered sufficiently with the exercise of Petitioners' property rights which resulted in prejudice to Petitioners, it is not necessary to show that the City of Houston had actual or constructive possession of Petitioners' property. The Texas Supreme Court, it is noted, refused a writ of error in *Magnolia Pipe Line Company v. City of Tyler,* 348 S.W.2d 537 (Civ.App. 1961, error ref'd.), when that court held damage may occur to a landowner by the interference by a governmental body with the right which the owner has to the legal and proper use of his property. In that case the Court of Civil Appeals stated:

> "By 'damage' is meant every loss or diminution of what is a man's own, occasioned by the fault of another, whether this results directly to the thing owned, or be but an intereference with the right which the owner has to the legal and proper use of his own. Gulf, C. & S. R. Co. v. Fuller, 63 Tex. 467."

A writ of error having been refused, such pronouncement of law was specifically approved by this Texas Supreme Court. Rule 483, T.R.C.P. In *Magnolia Pipe Line Company v. City of Tyler,* supra, the city, subsequent to the acquisi-

tion by Magnolia of a pipe line easement, interfered with Magnolia's pipe line easement by requiring Magnolia to lower its pipe line so that the city could pave the street and lower the grade of the street. The city made no physical invasion or appropriation of Magnolia's easement and it did not condemn Magnolia's easement, nor take actual nor constructive possession of same, but merely required Magnolia to lower its existing pipe line. The City of Tyler contended that since it had exclusive dominion over the public streets it was entitled, under its police power, to require the relaying and relocating of the pipe line. The Court of Civil Appeals held that such interference with Magnolia's easement or the part of the City of Tyler constituted a damaging within the terms of the Texas Constitution. This holding has been recognized by the Federal courts in *Buckeye Pipe Line Company v. Keating*, 229 F.2d 795 (7th Cir.). It is also interesting to note the identical situation was before the Court in *Henle v. City of Euclid*, 97 Ohio App. 258, 125 N.E.2d 355, appeal dism. 162 Ohio St. 280, 122 N.E.2d 792. There the court held that the city did not have the right "to 'freeze' an owner's property or interfere with its beneficial use until it gets around to appropriating it for public purposes as a part of a freeway, nor is the owner compelled to stand by, paying taxes without benefit, until the development reaches a stage, if it ever does, where the property must be taken for freeway purposes." Also, the United States Supreme Court in *City of Chicago v. Taylor*, 125 U.S. 161, 8 S.Ct. 820, 823, 31 L.Ed. 638, has held and recognized that "damage" may occur to a landowner without an actual trespass or physical invasion of the owner's real estate. In the present case the City passed a peremptory ordinance preparatory to the condemnation of the subject property for use in the Civic

Center in which said Civic Center Ordinance designated and defined the area to be condemned including Appellees' property, established building lines, and prohibited absolutely by an Ordinance (having the dignity of a legislative enactment), the construction of any building within such area. Furthermore, the Ordinance directed that it should be recorded in the Deed Records of Harris County, Texas, and it was so recorded at Volume 3572, Page 85, of the Deed Records of Harris County, Texas (S.F. 1, p. 3, II, 19-25; p. 4, II. 1-3) (S.F. 6, pp. 6-8) thus giving the world in general and any prospective purchasers in particular, or those interested in the title of Petitioners' property, notice that if they purchased Petitioners' property the City had a prior claim of right to the property by reason of its power of condemnation and further, that if they purchased such property that they were prohibited by law from constructing any building thereon.

It has never been shown by Respondent how the passage of such Ordinance served the public health, safety, morals or welfare of the citizens of Houston, Texas. Neither has it been shown why it was necessary to record such Ordinance in the Deed Records of Harris County, Texas if it was not for the sole and express purpose of restricting and holding down property values in the area and preventing the application of the property to a higher and better use than that to which it was put at the time of the passage of the Ordinance. Indeed, Section I of the Ordinance provides that the Council finds that "public necessity and convenience requires the designation and *protection* of the Civic Center." (Emphasis supplied). It is not shown by the Ordinance nor by the record in this case in what manner the Civic Center is "protected" or how such "protection" relates to the public health, safety, morals or welfare of the

citizens of Houston, Texas. The only possible purpose and reason for the passage of such Ordinance could be, and was, for the restriction of development in the area for any purpose inconsistent with that to which the City wished to put the property, and to reduce the cost of acquisition to such property on the part of the City, at which time, if ever, the City decided to acquire it. It is also to be noted that the Ordinance was not an attempt to regulate or enjoin nuisances or buildings that would in any way be harmful to the public health, safety, morals or welfare of the citizens but was an absolute prohibition of the use of the land for any purpose whatsoever which would require the building of improvements thereon. No jurisdictional prerequisite to the condemnation proceedings requires the prohibition of building permits or the recordation in the Deed Records of Harris County, Texas of the City's Ordinance. Respondents have never, in any court in this case, explained to such Court how the Civic Center Ordinance served the public health, safety, morals or welfare of its citizens. In the *City of Corpus Christi v. Jones*, 144 S.W.2d 388, 397, writ dism., the Court stated:

> "Private property cannot, under guise of police power, be subjected to unreasonable annoyance and arbitrary restriction of its use where the public welfare can in no way receive benefit by such restrictions."

The crux of the matter is, of course, whether the interference or restriction by the City is lawfully or unlawfully exercised. The test to be applied is whether or not the exercise of such police power is reasonable, and, whether it promotes or protects the health, safety, morals or public welfare of the citizens.

In *City of Wills Point v. Deen,* 192 S.W.2d 940 (no writ hist.), the ordinance in question had for its sole purpose the prevention of fire or guarding against calamities of fire. It is prohibited repair on all buildings constructed of wood within the fire limits, without limitations. The Court in holding that to deny one any right to repair would take his property without due process said that only in such cases where the repairs shall endanger life or health, violate the laws of decency or obstruct the reasonable and comfortable use of the property, or which are subversive of public order, decency or morals, or which constitute an obstruction of public rights, or which shall impose danger of fire risk, or a source of danger to adjoining buildings, and such like, shall a city have the power under policy regulations to impose restrictions on minor repairs to buildings lawfully constructed. The Court held that the owner had a vested right to such property which the Ordinance contravened in violation of the Constitution. See also *City of Texarkana v. Mabry,* 94 S.W.2d 871 (Civ.App. 1936, error dism.).

So it is seen that every exercise of police power is not a valid or reasonable exercise of police power, nor is every so-called "governmental function" in truth and fact the exercise of a governmental function unless it is properly exercised. In the instant case the Ordinance merely protected the City's financial position at the time of its passage to the expense of the landowner over a five year period.

It has been held in many jurisdictions that zoning and like ordinances cannot be used as a substitute for eminent domain proceedings so as to defeat the constitutional requirement for the payment of just compensation in the case of the taking of private property for public use by

depressing values and so reducing the amount of damages to be paid. 1 Nichols on Eminent Domain §142, p. 134; 1 Metzenbaum, Zoning (2nd Ed.), pp. 74-79; 1 Orgel, Valuation under Eminent Domain (2nd Ed.), §1, p. 10; 1 Yokley, Zoning (2nd Ed.), §163; *Robyns v. City of Dearborn,* 341 Mich. 495, 67 N.W.2d 718; *Grand Trunk Western R. Co. v. City of Detroit,* 326 Mich. 387, 40 N.W.2d 195; *State ex rel. Tingley v. Gurda,* 209 Wis. 63, 243 N.W. 317; *Henle v. City of Euclid,* 97 Ohio App. 258, 125 N.E.2d 355, appeal dism. 162 Ohio St. 280. 122 N.E. 2d 792. *Cf. Scholl v. Borough of Yeadon,* 148 Pa. Super. 601, 26 A.2d 135. See also *In re: Gibson,* 28 Ont.L.R. 20, 11 D.L.R. 529 (1913), in which a city by-law classified certain property as residential and imposed a set-back restriction. The court there said that if the sole purpose of these restrictions was to prevent any building on the property pending its condemnation for use as a street, then the by-law should be treated as a part of the expropriation proceeding."

In *Miller v. City of Beaver Falls,* 368 Pa. 189, 82 A.2d 34 (1951), it was there held that the action of a city in plotting ground for a park or playground and freezing it for three years was in reality a "taking" of property by possibility, contingency, blockage, and subterfuge in violation of the Fourteenth Amendment, Section I of the Constitution of the United States and in *Peters & Whalen, Inc. v. Schnetzer,* 194 N.Y. Supp. 2d 333 (S.Ct. 1959), the court held that:

> "Complete sterilization of private property by legislative fiat without compensation to owner is confiscatory and violative of state and federal constitution."

The federal courts have long followed the rule that the interference of the use of the landowner's property and the rights which he is entitled to legally exercise by an unjust exercise of police power will constitute a taking of such property, without due process or just compensation, under the Constitution.

The Supreme Court of the United States early recognized and applied the rule in the case of *Chicago R.I. & P. Ry. Co. v. United States,* 284 U.S. 80, 52 S.Ct. 87, arising out of the enforcement of an order of the Interstate Commerce Commission which required the railroad to cease and desist and thereafter to abstain, from applying rules for car-hire settlements in conflict with those prescribed by the Commission's order. The Commission found that all railroads were entitled to receive a definitely fixed sum per day for every day used by a foreign line, and then entered an order relieving some of the railroads, in whole or in part, from such payments. The Court found such regulation to be arbitrary and unreasonable and therefore an infringement upon the right of ownership which was a violation of the due process of law clause of the Fifth Amendment. The Court stated:

> "Confiscation may result from a taking of the use of property, without compensation, quite as well as from the taking of the title. Chicago M & St. P. R. Co. v. Minnesota, 134 U.S. 418, 458, 10 S.Ct. 462, 33 L.Ed."

See also *Societe Cotonniere Du Tonkin v. United States,* Ct. Cl. 1959, 171 F.Supp. 951, Cert. Denied 80 S.Ct. 594, 361 U.S. 965, 4 L.Ed. 2d 545 where the Court stated:

> "It is not necessary that there be a 'taking' in the sense of one being deprived of legal title, or physical

possession. Substantial interference with the owner's use of the property is sufficient."

In *Symonds v. Bucklin, District Court,* 197 F. Supp. 682 (D.C. 1961) the validity of the Montgomery County Zoning Ordinance was in question and was an action for an injunction to restrain the county and its officials from disapproving the owner's application for a building permit. The zoning ordinance provided for building lines and provided that where an area was designated for a plan of highways showing a proposed new highway or street location or widening of an existing street, no building or part of a building shall be permitted to be erected within the lines of such proposed highway or street (note the similarity to the ordinance of the case at bar which prohibits the erection of any new building and instructs the Director of Public Works to refuse to issue any building permit therefor). The court, quoting from the Supreme Court of the United States in *United States v. Central Eureka Mining Co.,* 357 U.S. 155, at page 168, 78 S.Ct. 1097 at page 1104, 2 L.Ed. 2d 1228; stated:

> "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case . . . In doing so, we have recognized that action in the form of regulation can so diminish the value of property so as to constitute a taking. United States v. Kansas City (Life) Ins. Co., 339 U.S. 799, (70 S.Ct. 885, 94 L.Ed. 1277); United States v. Causby, 328 U.S. 256 (66 S.Ct. 1062, 90 L.Ed. 1206)."

The Court held that the Plaintiff in this case had not shown that the zoning ordinance had the purpose or effect

of restricting his use of the property, but the court stated that:

> "Zoning cannot be used as substitute for eminent domain proceedings to defeat the payment of just compensation by depressing values and so reducing amount of damages to be paid when private property is to be taken for public use."

In *Robertson v. City of Salem,* 191 F. Supp. 604 (D.C.), the Court found that the ordinance was so restrictive as to be violation of the constitutional guaranty against appropriation of property for the public use without due process or just compensation. The court in this case said the prime or major factor in determining reasonableness and validity of a restrictive zoning ordinance is whether the use restriction tends to advance some legitimate interest, the decisive question then becomes "what matter of public interest or general welfare of the enacting society is served by prohibiting one of its members from using his property for business or commercial purposes, when his neighbor directly across a city street is permitted to do so." Again, the restrictive ordinance in this case provided that no building permits should be issued for improvements in the district until application therefor was approved by the common council. It also provided:

> "This section is enacted for the purpose of protecting the Capitol area, which the State of Oregon may eventually acquire, from invasion by buildings or enterprises not in harmony or keeping with plans of the State of Oregon or the Capitol Planning Commission and to prevent costly and new construction of property which the State may acquire."

In the case at bar the only purpose set forth by the passage of the Ordinance is "to protect the Civic Center".

The Court in this case held that the Ordinance was clearly unrealistic and unreasonable so far as the general welfare of Salem was concerned and that the landowner was a victim of discriminatory treatment to prevent a higher and better use of the property within its boundaries which was to be Oregon's future gain. The court found that the only possible reason for passing such Ordinance was to restrict land values in the area until the City of Salem got around to condemning the landowner's property. The court stated:

> "The effect of Salem's Ordinance No. 4578 was, in the vernacular, merely to freeze the land uses within the Capitol area and to prevent otherwise normal economic growth to Salem, by way of private enterprising of higher and better uses of the land within the District."

The court stated that the Ordinance was "arbitrary and discriminatory and that it is, in effect, an attempt on the part of Salem to use its police power to take Robertson's property without due process of law and without payment of just compensation for the taking, and therefore violative of the guarantees of the Constitutions of the United States and the State of Oregon, and, hence, void as to Robertson."

CONCLUSION

We think the City must necessarily answer the questions:

(1) What governmental function did the Ordinance which it passed serve in designating the Civic Center building lines;

(2) What governmental function did the Ordinance serve in its absolute prohibition against the erection of any building within the area designated as the Civic Center; and

(3) What governmental function did the Ordinance serve when the officials of the City caused it to be recorded among the Deed Records of Harris County, Texas, to give notice to the world and to prospective purchasers, lessees or users in particular, that the City had a prior claim or right on said property for Civic Center purposes by virtue of its power of condemnation and that any prospective purchaser, lessee or user would not be permitted to erect any structure on said property.

In the absence of a satisfactory answer to such questions, we think the conclusion must be made that the City unreasonably exercised its police power.

Respectfully submitted,

FENTRESS BRACEWELL
WILLIAM H. WHITE

Of Counsel:

BRACEWELL, REYNOLDS & PATTERSON
1808 First City National Bank Building
Houston, Texas 77002 FAirfax 3-5361

Attorneys for Petitioners

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari has been served upon R. H. Burks, City Attorney, Joseph G. Rollins and Clifton E. Speir, Senior Assistant City Attorneys, at their respective offices at City Hall, Houston, Texas, by placing same in the United States mail, postage prepaid, on this 11th day of February, 1965.

Fentress Bracewell
Attorney for Petitioners

APPENDIX "A"

NO. 114,184

CITY OF HOUSTON

vs.

ROSS BIGGERS, ET AL.

IN THE COUNTY CIVIL COURT AT LAW NO. 2
HARRIS COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED, that on the 25th day of March, 1963, there came on to be heard in its regular order the above entitled and numbered cause, and came the Condemnor, the City of Houston, by and through its Attorneys of Record, the Honorable Richard Burks, City Attorney of Houston, Texas, Joseph G. Rollins and Clifton E. Speir, Senior Assistant City Attorneys of Houston, Texas, and came the Defendants, Ross Biggers and wife, Virginia Yundt Biggers, and Hal Biggers and wife, Alice Adele Tyron Biggers, by and through their Attorneys of Record, William H. White and Fentress Bracewell; and the said parties having announced ready for trial and a jury having been demanded, there was duly examined, qualified, empaneled and sworn a jury of good and lawful men and women, citizens of Harris County, Texas, to-wit: B. V. Dees and five others, and the Court and jury having heard the pleadings, the evidence and argument of counsel, and the jury having been charged by the Court in writing, such written charge being as follows:

"CHARGE OF THE COURT

"The Court charges you as to the law applicable to this cause and by which you will be governed, as follows:

"This cause will be submitted to you upon what the law terms 'Special Issues' and you will, for your verdict in this case, which must be a unanimous verdict, answer from the evidence before you the Special Issues hereinafter submitted to you, writing your verdict on a separate sheet of paper which will be signed by your Foreman whom you shall select from among your number.

"In your deliberations you must not discuss nor consider anything that has not been placed in evidence before you; and you shall not discuss nor consider what effect any of your answers may have upon the rights of the parties, nor the judgment that may be rendered by this Court in this cause, as it will be the duty of the Court to determine these matters.

"You are instructed that you are not to reach a verdict in this cause by any species of lot or chance, or any sort of agreement other than your fair consideration of the evidence admitted before you; and you shall not discuss or consider in your deliberations any matters whatsoever (other than from the evidence admitted before you) that you may personally know about the facts of the case or that any of your fellows may know, to the end that your findings may truly represent your deliberate conclusions, based upon a fair consideration of the evidence under these instructions.

"By the term 'Preponderance of the evidence', as used in this Charge, is meant the greater weight and degree of credible evidence before you.

"INSTRUCTION NO. 1

"You are instructed that the term 'market value' is the price which the property would bring when it

is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either it, or in all reasonable probability will become available within the reasonable future.

"INSTRUCTION NO. 2

"You are instructed that ordinarily improvements have no market value separate from the land and when considered in arriving at the answers to the Special Issues submitted to you, improvements can only be considered to the extent that they add to, increase or enhance the value of the land.

"INSTRUCTION NO. 3

"In determining the market value of the property as that is submitted to you in the Special Issue, you are instructed that since the property in question is within the right-of-way for the Civic Center which the City is acquiring, that you not take into consideration any increase in market value of the property, if any, there was, which may have accrued to the property due to the location of said Civic Center.

"You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony but you are not the judges of the law; the law you will receive from the Court, as given you herein, and you will be governed thereby.

/s/Wm. A. Miller, Jr.
Judge Presiding

"SPECIAL ISSUE NO. 1

"What do you find from a preponderance of the evidence was the market value of the property of

Defendants herein condemned by the City of Houston on March 26, 1963.

"Answer in dollars and cents.

to which the Jury answered:

"ANSWER SHEET FOR JURY

"SPECIAL ISSUE NO. 1. $1,157,615.00

"The above answer constitutes our verdict.

/s/ B.V. Dees
Foreman"

AND IT FURTHER appearing to the Court according to the stipulations of the parties, and this Court finds, that this Court has jurisdiction of the parties, the subject matter of this cause and that all proceedings necessary to invest this Court with jurisdiction of the subject matter and the parties to this cause have been instituted, maintained, and complied with as required by law to invest this Court with jurisdiction over the subject matter and parties to this cause, and that the Defendants are owners of the hereinafter described land in their own separate right and that it is necessary, advisable and expedient for the City of Houston, Texas, to occupy the land hereinafter described for the purpose, use and benefit of the Civic Center of the said City of Houston, Texas, as set forth in Plaintiff's Statement in Condemnation herein, and to acquire, take, hold, occupy, use and own said land hereinafter described, in fee simple title, for the purpose of the aforesaid Civic Center. The Court having considered the pleadings, the evidence, all stipulations of the parties in the record hereof, and the answer of the jury to the Special Issue submitted to it as above recited, and having found that judgment should be

entered for Plaintiff for title and possession of said lands and for Defendants in the amount found by the jury in its answer to Special Issue No. 1, the Court is therefore of the opinion that the said Defendants and Condemnees, Ross Biggers and wife, Virginia Yundt Biggers, and Hal Biggers and wife, Alice Adele Tyron Biggers, should recover of and from the City of Houston, Texas, the sum of One Million One Hundred Fifty-seven Thousand Six Hundred Fifteen ($1,157,615.00) Dollars for the said land condemned, said land being condemned and taken for Civic Center purposes being further described as follows:

> The fee simple title in and to all that lot, tract or parcel of land, being all of those certain tracts of land described by deed from Emil W. L. Hartman, et al., to E. M. Biggers recorded in Vol. 812, Page 152 of the Deed Records of Harris County, Texas, a 39,203 square foot tract of land conveyed to Biggers Printing Co., Inc. from E. M. Biggers by deed recorded in Vol. 891, Page 666 of the Deed Records of Harris County, Texas, and "1st Tract", "2nd Tract" and "3rd Tract" of 3 tracts of land out of the Hartman tract conveyed to Biggers Printing Co., Inc. by deed recorded in Vol. 1067, Page 303 of the Deed Records of Harris County, Texas, save and except for a 3,135 square foot parcel of land heretofore conveyed to the City of Houston, Texas, from E. M. Biggers for the widening of Sabine Street, all tracts of land being out of Lot 14, Block 3, Hollingsworth Subdivision of the John Austin Survey in Houston, Harris County, Texas, and being more particularly described by metes and bounds as follows:
>
> BEGINNING, at a steel rod in the east line of Sabine St., the existing northwest corner of the said Biggers Printing Co., Inc. tract of land said beginning point being

located South, a distance of 431.70 feet from the City of Houston Reference Rod No. 157 in Capitol Ave.;

THENCE, East, at 217.60 feet passing an iron bolt in the west line of Hartman St. formerly known as Shock St., marking the northwest corner of the aforesaid "3rd Tract", in all, a distance of 252.60 feet to a point in the east line of Hartman St., the northeast corner of said "3rd Tract";

THENCE, South, along the southerly projection of the east line of Hartman St., a distance of 27.75 feet to a point, the northwest corner of the aforesaid "1st Tract" said point being located South, a distance of 204.45 feet from the intersection of the east line of Hartman St. and the south line of Nelson St.;

THENCE, East along the north line of said "1st Tract", a distance of 229.70 feet to a 1 1/2 inch iron pipe in the east line of said Lot 14, Hollingsworth Subdivision marking the northeast corner of said "1st Tract";

THENCE, South, along the east line of said Lot 14, a distance of 204.45 feet to a concrete monument marking the southeast corner of the aforesaid "2nd Tract";

THENCE, West, along the south line of said "2nd Tract", a distance of 229.70 feet to a point in the southerly projection of the east line of Hartman St., the southwest corner of said "2nd Tract";

THENCE, South, along the southerly projection of the east line of Hartman St., a distance of 36.53 feet to the center of the old channel of Buffalo Bayou;

THENCE, S 43° 03′ E, along the center of the old channel of Buffalo Bayou, a distance of 8.76 feet to a point;

THENCE, S 27° 31′ E, continuing along the center of the old channel of Buffalo Bayou, a distance of 76.35 feet to a point, the southeasterly corner of the aforesaid 39,203 square foot tract of land;

THENCE, S 89° 22′ W, along the southerly line of the said 39,203 square foot tract of land on the north side of Buffalo Bayou, a distance of 156 feet to a point;

THENCE, N 83° 13′ W, continuing along the southerly line of the said 39,203 square foot tract of land on the north side of Buffalo Bayou, a distance of 93.20 feet to a point in the east line of Sabine St., the southwesterly corner of both the said 39,203 square foot tract of land and the Biggers Printing Co., Inc. tract of land;

THENCE, N 7° 37′ W, along the east line of Sabine St., a distance of 304.30 feet to a point;

THENCE, North, continuing along the east line of Sabine St., a distance of 31.65 feet to the PLACE OF BEGINNING, containing 128,520 square feet of land,

and that the City of Houston, Texas, should recover title and possession of such lands and should pay all costs of these proceedings.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the City of Houston, Texas, recover of and from the Condemnees, Ross Biggers and wife, Virginia Yundt Biggers, and Hal Biggers and wife, Alice Adele Tyron Biggers, the land described aforesaid in fee simple title together with possession thereof to be used by said City for the Civic Center of said City of Houston, Texas, as set forth in its Statement in Condemnation, and the fee simple title to the above described land is hereby de-

creed to be in and vested in the City of Houston, Texas, together with the possession thereof.

It is tnerefore ORDERED, ADJUDGED and DECREED by the Court that the Condemnees, Ross Biggers and wife, Virginia Yundt Biggers, and Hal Biggers and wife, Alice Adele Tyron Biggers, do have and recover of and from the City of Houston, Texas, and said City of Houston, Texas, be and it is hereby directed to pay the said Defendants and Condemnees as their separate property and funds the amount of One Million One Hundred Ffty-seven Thousand Six Hundred Fifteen ($1,157,615.00) Dollars, with interest thereon from and after the date of the entry of this judgment at the rate of Six (6%) Per Cent per annum until paid, as the damages of said Condemnees sustained and suffered to and by the said Condemnees for the lands taken by said Condemnor; that Condemnees shall have such writs and processes as may be proper and necessary for the enforcement of the terms and provisions of this judgment and for the collection of the said sums and amounts awarded to them under this judgment.

It is further ORDERED, ADJUDGED and DECREED by the Court that all costs of this proceeding be and they are hereby taxed against the City of Houston, Texas, for which the officers of this Court may have all proper and necessary writs for the enforcement, payment and collection thereof. Prior to entry of this Judgment Plaintiff has filed a Motion to Dismiss. Plaintiff excepts to entry of this Judgment.

MADE, RENDERED and ENTERED this the 19th day of April, 1963, it being on a day of the regular term of the County Civil Court at Law No. 2 of Harris County, Texas.

/s/ WILLIAM A. MILLER
WILLIAM A. MILLER, Judge of the
County Civil Court at Law No. 2
of Harris County, Texas

APPROVED AS TO FORM:
Richard Burks, City Attorney
of the City of Houston, Texas

By_____
Joseph Rollins, Senior Assistant
City Attorney
Attorneys for Plaintiff

Bracewell, Reynolds & Patterson

By /s/ WILLIAM H. WHITE
William H. White
Attorneys for Defendants

Reversed and remanded with instructions to dismiss, and opinion filed June 11, 1964.

APPENDIX "B"

CITY OF HOUSTON, APPELLANT,
NO. 14298

vs.

ROSS BIGGERS ET AL, APPELLEES.

Appeal from County Civil Court at Law of Harris County

This is an appeal from a judgment in a condemnation case awarding appellant title to 128,520 square feet of land in the City of Houston and giving appellees recovery against appellant for $1,157,615.00 which was the value of the land as determined by a jury.

Appellant complains that the trial court erred in not granting its motion to dismiss the case which motion was made after verdict but prior to the rendition of judgment. The position of appellees is that because of the acts on the part of appellant hereinafter noticed there had been "a taking" of the property before the motion to dismiss was made and the point of no return had therefore been reached by appellant.

On April 3, 1962, the Judge of the court, in response to a petition filed by appellant, appointed commissioners to determine the value of appellees' property. The property was to be acquired by appellant as a part of the "Civic Center." After hearing, the commissioners, on June 22, 1962, made their award and it was filed with the judge July 6, 1962. On the same day appellees filed their ob-

jections to the award. Trial of the case in court commenced March 25, 1963. The jury returned its verdict March 29, 1963. On April 3, 1963, the City Council passed a motion authorizing the City Attorney to dismiss the case and directing him to prepare an ordinance eliminating appellees' property from the "Civic Center." On April 4 the motion to dismiss the case was filed. It recited the action of the Council in determining not to purchase the property at the value assessed and to exclude the property from the Civic Center and authorized dismissal of the case.

On April 19 appellees filed an answer to the Motion to dismiss and made a motion for judgment on the verdict. The basis of the opposition was that because of the appellant's acts with regard to the property, which we will specifically notice when we review the evidence given on the motion, appellees would be prejudiced by dismissal.

On April 19 appellant filed an amended motion to dismiss which attached a copy of an ordinance passed April 17 purporting to exclude the property from the Civic Center.

A hearing was commenced on the motion to dismiss on April 19, at which evidence was introduced, but it was not completed and was recessed until April 26. However, the court rendered judgment on the verdict April 19. At that time, as evidenced by the judgment signed by the court, appellant excepted to the judgment, and it was also recited therein that the motion to dismiss had been filed.

On April 26 the hearing on the motion to dismiss was resumed and at that time appellant filed what it denominated "Motion to Set Aside Judgment and Enter

Judgment of Dismissal." It added an ordinance of April 24 passed by the City Council which definitely excluded appellees' land from the Civic Center. After further evidence was introduced the motion to dismiss was overruled.

The evidence on the motion to dismiss reflected without dispute that appellant had never taken physical possession of the property or any part thereof and that no deposit of the amount of the award made by the commissioners had ever been made so as to give appellant the right to possession. It showed that September 23, 1958, the City Council passed an ordinance determining that "Public necessity and convenience required the designation and protection of the Civic Center." The Civic Center was then designated as covering a defined area including appellees' land. It further provided that within the area no new structures would be permitted to be built and no repairs to existing structures would be permitted where the cost of the repairs in one calendar year exceeded 25% of the value of the structure repaired. The Director of Public Works and Engineering was directed to refuse any permit to build new structures or to make repairs contrary to the ordinance.

Mr. Ross Biggers, one of the appellees, testified that since the passage of the ordinance appellees had made repairs to the existing structure by putting on a new roof. He had made no application for any permit for a new structure. There is no evidence that appellees contemplated any new structure or additions to the existing structure. Appellee operated a printing business on the property. The operations, including the use of the building and parking facilities, utilized an estimated 5% of the property. Appellees at no time sought amendment of the Ordinance

to exclude their property. It appears that prior to 1961 the City assessed the property for taxes at a relatively small amount, and beginning in 1961 raised the valuation from $6,950.00 to $217,000.00. Mr. Biggers made it clear that all values for tax purposes, both before and including the increase, were those fixed by the City and not appellees. The owners did not render the property nor was there any appeal to the Board of Equalization. In 1961, when there was this great increase Mr. Biggers appeared before the City Council to protest the increase when he could not utilize the property further because of the ordinance and increase his revenue. He did not, he testified, appear to protest that the amount of the increase exceeded what was a fair value for tax purposes. At that time someone on the Council told him not to worry, the City was going to take the property.

The evidence showed that at times after the passage of the ordinance of September, 1958, appellees had had various people who were interested in negotiating for purchase of the property but ended negotiations when it was learned the property was under threat of condemnation. It should be stated that appellant had the ordinance creating the Civic Center filed in the Deed Records of Harris County. The ordinance in fact directed the City Secretary to file a certified copy with the County Clerk. One advertiser wanted to lease space from appellees for a sign at $500.00 per month but lost interest when he learned of the threat of condemnation. It does not appear just when this interest was shown but the letters introduced in evidence are dated in 1961 and 1962.

As above stated, the City Council, by motion, on April 3, 1963, directed dismissal of the suit and the preparation

of an ordinance excluding this property. An ordinance, which is numbered 63-544, was passed April 17, 1963. In the ordinance it was found by the Council that the value as found by the jury exceeded the benefit that would result to the public from acquisition of the property. Section 2 of the ordinance recites that the Council finds and determines that the ordinance of September 23, 1958 (Ordinance No. 58-1053) should be amended so as to exclude this property. It directed the City Secretary to file a certified copy for record with the County Clerk. It was purportedly passed as an emergency measure. Appellees contend this ordinance did not take effect immediately because not shown to have been supported by the proper number of Councilmen. Also, they contend, it merely declares the land should be excluded but does not specifically enact that it is thereby excluded. On April 24 the Council passed Ordinance No. 63-560, which definitely excluded appellees' land.

In testifying as to value in the condemnation hearing before the jury, Mr. Ross Biggers, one of the appellees, testified the property had a market value of $1,285,200.00, or $10.00 per square foot. One of appellees' experts testified the same and another testified to $1,250,000.00. Mr. Jungman, one of the appellees' experts, testified for several years there had been a rising market and gave as his opinion that the property in the area was increasing at about 16% per annum. Mr. Biggers testified he would rather have the property than get $10.00 per square foot for it.

Appellees' position is that because of the facts detailed the court was correct in overruling the motion to dismiss. The foundation for such is their contention as follows:

1. The passage of Ordinance No. 58-1033 and its continuance in force until the ordinance of April 24, 1963 effected a "taking" of the property.

2. They would be prejudiced because they had been unable to negotiate for the sale or additional use of the property that might entail additional structures.

3. They had been put to expense in connection with the proceedings.

4. Appellant could, after dismissing the suit, refile and possibly get a lower award. In this connection they seem to assert this is the real purpose in seeking to dismiss. In other words, they challenge the good faith of appellant.

We are of the view that the court was in error in not sustaining the appellant's motion to dismiss.

The rule is well settled in Texas that a condemnor may elect to dismiss a condemnation proceeding at any time prior to judgment if there has been no taking of possession of the property under and by virtue of acquiring the right to possession under an order in a condemnation proceeding or under an agreement with the condemnee pending the proceedings. Brazos River Conservation and Reclamation Dist. v. Allen, 171 S.W.2d 842 (S.Ct.); Thompson v. Janes, 251 S.W.2d 953 (S. Ct.); Lower Nueces River Water Supply Dist. v. Cartwright, 328 S.W.2d 752 (S. Ct.); Leonard v. Small, 28 S.W.2d 826 (C.C.A.), writ ref.; Brazos River Conservation and Reclamation Dist. v. Harmon, 178 S.W.2d 281 (C.C.A.), ref., w.m.; Board of Regents of State Teachers College v. Kelley, 208 S.W.2d 565 (C.C.A.), no writ hist.; Rook v. McCulloch County, 326 S.W.2d 603 (C.C.A.), no writ hist.; Nehoc Land Co. v. City of Houston, 342 S.W.2d 42 (C.C.A.), ref., n.r.e.;

Houston Pipe Line Company v. Brown, 361 S.W.2d 884 (C.C.A.), ref., n.r.e. See also Nichols, The Law of Eminent Domain, 3rd Ed., Sec. 26.42, p. 192.

In many of the cited cases the expression is used that there may be dismissal where the landowner "will not be prejudiced". It was then held there was no legal prejudice in any of them except those where prior to attempted dismissal there was actual physical possession under and by virtue of condemnation proceedings, or, possession by agreement pending condemnation and at the time of attempted dismissal possession had not been returned or offered to be returned.

In this case it is undisputed that appellant at no time had possession of the land or any part thereof.

The passage of the ordinance including the land in what was contemplated as a Civic Center did not, as appellees contend, constitute a taking. The act was purely legislative and could be changed at any time. Even though it might have, as a practical matter interfered with the marketability of the property, it would cause but an incidental damage which is not compensable. The fact that at some future time land might be taken under eminent domain, even where the threatened taking is eminent, is but one of the conditions on which an owner holds property.

In the case of State v. Vaughan, 319 S.W.2d 349 (C.C.A.), no writ history, the State of Texas sued to condemn residence property that was used by the owners to lease to tenants. The property was within the area that had been designated under authority of statute, by the State Bulding Commission, as the area where property would be acquired for the construction of State buildings.

The Executive Director wrote the owners a letter notifying them of the intent to condemn the property. Tenants, knowing of this, began to move. In the case the owners sought to recover as an element of damage the loss of rental caused by the threat of condemnation. The court denied recovery, holding the action occasioning the vacation by tenants did not constitute a "taking" because there was no physical invasion by the condemnor.

The above stated rule is also supported by the following cases from other jurisdictions: Hamer v. State Highway Commission of Missouri, 304 S.W.2d 869 (Mo. Sup., Div. 2); Scorbino v. New Brunswick, 129 A.2d 473 (N.J. Super.); U. S. v. Sponenbarger, 60 S. Ct. 225, 308 U.S. 256; Chicago Housing Authority v. Lamar, 172 N.E.2d 790 (Ill. Sup.); Mosher v. City of Phoenix, 7 P.2d 622 (Ariz. Sup.); Danforth v. U. S., 308 U.S. 271, 60 S. Ct. 231; Eckoff v. Forest Preserve Dist., 36 N.E.2d 245 (Ill. Sup.); 64 A.L.R. 546.

Appellees urge they were prejudiced because the threat of condemnation by virtue of the ordinance prevented negotiations for sale and prevented their effective use of the property except for about 5% of the area This would be but an incidental damage that is not compensable. In this connection, however, it is noticed that the evidence shows such repairs as appellees wished to make on their property they were permitted to make. They apparently did not wish to make any additional improvements because they made no application for a permit to build. Mr. Biggers did testify they took the Council at its word that no permit for building would be issued. We have no doubt that had appellees desired to build but did not do so because they felt they could not get a permit, Mr. Biggers would have

so testified. If appellees had desired to do so they had their remedy, in spite of the ordinance by mandamus. Kirschke v. City of Houston, 330 S.W.2d 629 (C.C.A.), ref., n.r.e. It would be purely speculative to say that appellees were deprived of any sale by interference with the right to negotiate. There is nothing to suggest an agreement would have probably been reached between appellees and a prospective purchaser. In the absence of such we are unable to see how any damage could be shown with any certainty. Too, it is noted the evidence shows there was a rising market in the area where appellees' property is located. They still have their property and Mr. Ross Biggers testified he had rather have the property than the $1,285,200.00 that he testified it was worth. The award was less than this.

Appellees complain of the expense they were put to. Attorneys fees, cost of experts and other expenses in preparation for trial are merely incidental expenses and not recoverable. City of Sherman v. Williams, 296 S.W. 663 (C.C.A.), no writ history. The incurring of them is not such prejudice as to require the condemnor to take property it decides it can do without. In every civil suit a plaintiff under Rule 164, T.R.C.P. can take a non-suit prior to a court's decision or the time the jury begins deliberations. Yet it is no condition to the exercise of the right that the plaintiff must pay attorneys' fees and expenses of the defendant. The same is true with regard to dismissal by the condemnor in a condemnation case.

The raising of the valuation for tax purposes does not result in any legal prejudice. It is observed that nowhere do appellees complain that the valuation is in anyway discriminatory or in excess of market value or the percentage of market value at which the City assesses property for tax purposes.

Finally appellees seem to challenge the good faith of the City in contending the City can refile the suit and they suggest the purpose of the City in dismissing was to avoid the high award of the jury and then to refile suit. There is no evidence to support such a suggestion. As related above, the City Council immediately after the verdict directed dismissal of the suit and preparation of an ordinance eliminating the area from the Civic Center. Then they, on April 17 passed an ordinance declaring it should be eliminated. We need not discuss whether it was in form sufficient to actually accomplish abandonment because it certainly evidences the Council's intention to abandon. Then when its sufficiency for that purpose was challenged, on April 24 an ordinance certainly sufficient was passed. It is true that the court excluded this ordinance, and we think erroneously, on the ground it was passed after the hearing on the motion to dismiss had commenced. However, it was passed prior to the completion of the hearing. It is true also that it was passed after judgment had been rendered on the verdict. However, the motion to dismiss was pending when the judgment was rendered and was being actively prosecuted by appellant. Too, the judgment was rendered before completion of the hearing on the motion to dismiss over appellant's objection as evidenced by its exception contained in the judgment and at a time when the court recessed the hearing on the motion to dismiss. We think this evidences rendition of the judgment without prejudice to appellant's motion to dismiss.

The judgment of the trial court is reversed with directions to the trial court to enter an order dismissing the case.

/s/ Spurgeon E. Bell
Chief Justice

Judgment rendered and opinion filed June 11, 1964.

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NO. 903

IN THE

Supreme Court of the United States

October Term, 1964

ROSS BIGGERS, ET AL., *Petitioners*

v.

CITY OF HOUSTON, *Respondent*

BRIEF OF RESPONDENT, CITY OF HOUSTON, In Opposition To Petition For Writ Of Certiorari

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NO. 903

IN THE

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October Term, 1964

ROSS BIGGERS, ET AL., *Petitioners*

v.

CITY OF HOUSTON, *Respondent*

BRIEF OF RESPONDENT, CITY OF HOUSTON, In Opposition To Petition For Writ Of Certiorari

The Respondent, City of Houston, files this opposition to the Petition for Writ of Certiorari filed by Petitioners to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

QUESTIONS PRESENTED

Questions presented for determination here are:

(1) Should the Supreme Court of the United States review this condemnation case involving only matters of state law and where no federal question is involved and where no federal question was ever raised in the state courts?

(2) Where the condemning authority has never physically entered on landowner's property, nor fulfilled the conditions of state law requisite to entry on the property, does such condemning authority have a right to abandon and dismiss condemnation proceedings, after jury verdict and prior to entry of final judgment, where its governing body finds and determines that the sum of the jury verdict exceeds the benefit to the public that would result from the acquisition of said tract by the condemning authority?

(3) Assuming it otherwise has the power to dismiss a condemnation proceeding, does the threat of condemnation, and/or the uncertainty created in the landowner's mind as to whether a property is to be condemned or not, constitutes a "point of no return", i.e., such a "taking" of the property, or such "prejudice" to the landowner, as to preclude a condemning authority from dismissing its condemnation suit?

(4) A city ordinance delineated the geographic limits of a proposed civic center and also attempted to prevent the erection of new buildings within those limits and to regulate the repairs on existing buildings. If the governing body of the said city determined that the price set thereon by the jury in a condemnation suit exceeded the benefit to the public that would result from the acquisition of a tract of land within those delineated limits; and, assuming it otherwise had the power to dismiss, would the existence of this ordinance prevent a condemning authority from amending the ordinance to exclude said land and to dismiss the condemnation suit?

STATEMENT

On the 23rd day of September, 1958, the City Council of the City of Houston, by Ordinance No. 58-1033, delineated

the boundaries of the proposed Civic Center (S.F. pg. 3, L 19-25; Pg. 4, L 1-3; Tr. 109-112). It is uncontroverted that the 128,520 square feet of land belonging to Petitioners, which is the subject matter of this controversy, is included within the boundaries, and abutting the western border thereof, of the proposed Civic Center as shown by said Ordinance No. 58-1033.

Prior to 1961, the subject property (land and improvements) had been assessed by the City for ad valorem taxes for $6,950, and in that year the assessment was raised to $217,000 (S.F. Bk. 5, Pg. 14, L 7-22; S.F. Bk. 6, Pg. 5).

On the 3rd day of April 1962, Respondent filed its Statement or Petition in condemnation, seeking to condemn subject property for the Civic Center (Tr. Pg. 3-7).

The Award of the Special Commissioners in condemnation was filed July 6, 1962 (Tr. Pg. 9-13), and was duly and timely objected to by Petitioners (Tr. Pg. 15). At no time was the amount of the Award of the Special Commissioners deposited into the Registry of the Court (S.F. Bk. 6, Pg. 4, L 4-9), nor was said amount ever paid to Petitioners in person (S.F. Bk. 6, Pg. 28, L 17-21). It is also uncontroverted that the City of Houston has never taken physical possession of, or trespassed on, subject property (S.F. Bk. 6, Pg. 34, L 2-8).

Objections to the Award having been filed, a trial by jury in the County Civil Court at Law No. Two, Harris County, Texas, commenced on March 26, 1963, and ended on March 29, 1963 (S.F. Pg. 1; Tr. Pg. 29).

To the jury, Petitioner Ross Biggers, further testified that he thought subject property was worth $10 per square foot [which would be $1,285,200], but that he would rather

keep the property than get $10 per square foot for it (S.F. Pg. 240, L 2-13).

The jury verdict for $1,157,615, which was $127,585 less than Petitioner swore it was worth, was rendered on Friday, March 29, 1963 (Tr. Pg. 29). On the following Wednesday, April 3, 1963, the City Council of the City of Houston, by Motion No. 63-1238, authorized the City Attorney to "Dismiss this suit as soon as possible in order that the motion to dismiss may be filed prior to entry of final judgment herein, *and to prepare an ordinance eliminating this property from the Civic Center.*" (S.F. Bk. 5, Pg. 57A) (Emphasis Added).

On Thursday, April 4, 1963, at 9:15 a.m., Respondent filed its Motion to Dismiss the Condemnation Proceeding (Tr. Pg. 31-32).

On April 17, 1963, the City Council of the City of Houston passed Ordinance No. 63-544 eliminating the subject property from the Civic Center (S.F. Bk. 5, Pg. 57B), said ordinance, at Section 1 thereof, found: "The City Council finds and determines that the sum of $1,157,615 exceeds the benefit to the public that would result from the acquisition of said tract by the City of Houston."

On April 19, 1963, Respondent filed its First Amended Motion to Dismiss (Tr. Pg. 33-40), and Petitioners filed their Motion Contesting the right of Respondent to dismiss (Tr. Pg. 105-113). A hearing was held thereon on April 19, 1963, at which hearing evidence was adduced (S.F. Bk. 5).

At the conclusion of the hearing the Court rendered a judgment on the verdict (Tr. Pg. 41-48), but continued the hearing on the Motions to dismiss until April 26, 1963 (S.F. Bk. 6, Pg. 2).

On April 26, 1963, the Court again heard evidence on the matter (S.F. Bk. 6); and after hearing testimony, the Court on April 26, 1963, overruled Plaintiff's Motion to Dismiss, First Amended Motion to Dismiss, and Motion to Set Aside Judgment and Enter Judgment of Dismissal, to all of which Respondent objected, excepted, and gave notice of appeal (Tr. 59-60).

It is uncontested, and Petitioners so state in their Application for Writ of Error to the Supreme Court of Texas, that Petitioners are continuing to operate their printing business on subject property as they have always done.

There was no testimony, nor could there be, of any projected public work or building, either proposed or being constructed, which would make the acquisition of subject property mandatory.

ARGUMENT

I.

JURISDICTION

This was a condemnation proceeding under the provisions of Title 52, Vernon's Civil Statutes, Texas, which governs practically all Texas condemnation procedure. The Petitioners are long-time prominent residents of the City of Houston and there is no question of diversity of citizenship. Nor, at any time in these proceedings until now, has a federal question been raised or passed on, directly or by implication.

The case of *Dewey v. City of Des Moines*, 173 U.S. 193, 19 S.Ct. 379 (1899) enunciated what Respondent believes to be the established law with regard to jurisdiction of the Supreme Court of the United States in a certiorari proceeding to review the action of a state court:

> "In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States." ***
>
> "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it . . . a point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it."

The Court's attention is called to the recent case of *Kirschke v. City of Houston*, 364 U.S. 474, 81 S.Ct. 242 (1960). This case involved the refusal of the City of Houston to issue Kirschke a building permit. Kirschke filed suit in the proper Texas District Court seeking monetary damages. He claimed, inter alia, as Petitioners do in the case at bar, that the refusal of the building permit constituted a "taking" of his property contrary to the laws of the State of Texas and the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

The Texas Court of Civil Appeals in *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex.Civ.App. 1959), had held:

> "Indeed, nothing has been done of a physical or tangible nature to Appellants' property or in connection with any other property in the area that could in any way interfere with Appellants' use of their property *in its present state*." (Emphasis added)

And,

> "Appellants insist . . . that the wrongful exercise of the police power in this case has resulted in the taking or damaging of their property . . . The answer to their contention is that the action of the City has not pro-

> gressed to the point where there has been any taking or damaging of property within the purview of either the State or Federal Constitutions, *since up to this time the City has merely refused to grant a building permit.*" (Emphasis added).

And,

> "In the instant case *the denial of the building permit did not constitute a taking or damage* to Appellants' property *although* it was *denied in the anticipation* that at *some uncertain future date steps might be taken under the right of eminent domain* that would amount to a taking of their property or damage thereto." (Emphasis added).

The Supreme Court of Texas refused a writ of error, stating the Court of Civil Appeals had committed no reversible error.

The Supreme Court of the United States, 364 U.S. 474, 81 S.Ct. 242, dismissed the appeal

> "for the reason that the judgment of the Supreme Court of Texas, sought here to be reviewed, is based upon a non-federal ground adequate to support it."

Here, it might be pointed out, Petitioners are not as far along as Kirschke, for they never applied for a building permit. (S.F. Bk. 5, Pg. 53, L 8-20; S.F. Bk. 6, Pg. 33, L 16-33; Bk. 6, Pg. 34, L 1).

The Texas Court of Civil Appeals also pointed out that Kirschke's remedy was by mandamus or injunction, not a suit for damages in what would practically amount to an inverse condemnation.

The Court's attention is also called to *Williamson v. Hopewell Redevelopment and Housing Authority*, 371

U.S. 234, 83 S.Ct. 315 (1963), wherein the Supreme Court of the United States held that a Virginia Supreme Court decision concerning adequacy of notice in a condemnation case did not present "a substantial federal question".

Nor is there any equitable situation here presented violative of any rights of Petitioners. Indeed, *before the jury*, Petitioner, Ross Biggers swore his property was worth $1,285,200, and, further that he would rather keep his property than get that price for it. The jury verdict of $1,157,615, was $127,385 *less* than the amount Petitioner Ross Biggers testified under oath the property was worth. As he deposed he would rather have his property than even to have what he said it was worth, surely his constitutional rights would not be violated by acceding to his wishes and allowing him to keep his property instead of expropriating it for an amount $127,385 less than he swore it was worth!

"Q. (Mr. White) Do you, Mr. Biggers, do you have any opinion as to whether or not if you were permitted to put your land on the market today and sell it you could get $10 a square foot for it? ($10 a square foot being $1,285,200, or $127,385 *more* than the ultimate jury verdict).
"A. (Mr. Biggers) I feel confident that we can.
"Q. If you had your choice would you rather have it to put on the market?
"A. I would rather keep it.
"Q. Would you rather take $10 a square foot for it or would you rather have it and put it on the market, Mr. Biggers?
"A. I would rather keep the land. May I say why?"
(S.F. Pg. 240, L 2-13, parenthetical matter added).

* * *

"Q. And if you had your rathers, you would rather keep it and put it on the market and sell it, is that right?
"A. Yes, sir, I would rather keep it."
(S.F. Pg. 241, L 5-9).

Nor, it is submitted, has the Respondent, in its ad valorem taxation, violated any of Petitioners' constitutional rights. Prior to 1961, the subject property (land and improvements) had been assessed by the City of Houston for ad valorem taxes for $6,950, and in that year the assessment was raised to $217,000. (S.F. Bk. 5, Pg. 14, L 7-22; S.F. Bk. 6, Pg. 5). Although the raise was substantial in relation to its former assessment for only $6,950, *the new assessment of $217,000 was still $1,068,200 less than Petitioner swore the property was worth.* Surely this does not violate any of his constitutional guarancies. In any event, State law offered him remedies for review of his assessment. Petitioner elected not to avail himself of these remedies.

Hence, Respondent submits that the Supreme Court of the United States should not entertain this Petition for Writ of Certiorari because not only were no federal questions *raised* in the state courts, but there *are* none.

II.

RIGHT TO DISMISS CONDEMNATION SUIT

Assuming, arguendo, Petitioners have satisfied the insurmountable jurisdictional question, it has long been recognized that a condemning authority may dismiss the condemnation proceedings in the event it feels that the price set upon the land sought to be condemned by the jury ex-

ceeds the benefit to the public to be derived from the ownership of said land.

> "Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost." *Danforth v. United States*, 308 U.S. 271, 284, 60 S.Ct. 231, 236 (1939).
>
> Also: *Twenty-Three Tracts of Land v. United States*, 177 F.2d 967 (C.C.A. 6, 1949); *Barnidge v. United States*, 101 F.2d 295 (C.C.A. 8, 1939);

This is the Texas rule also: *Brazos River Conservation & Reclamation Dist. v. Allen*, 141 Tex. 208, 171 S.W.2d 842; *Thompson v. Janes*, 151 Tex. 495, 251 S.W.2d 953 (1952); *Lower Nueces River Water Supply Dist. v. Cartwright*, 160 Tex. 239, 328 S.W.2d 752 (1959); *Leonard v. Small*, 28 S.W.2d 826 (Tex.Civ.App. 1939, error ref.); *Harrell v. City of Denton*, 116 S.W.2d 423 (Tex.Civ.App. 1938); *Brazos River Conservation & Reclamation Dist. v. Harmon*, 178 S.W.2d 281 (Tex.Civ.App. 1944, error ref. w.m.); *Board of Regents of State Teachers College v. Kelley*, 208 S.W.2d 565 (Tex.Civ.App. 1948); *Armendaiz v. Ray*, 215 S.W.2d 210 (Tex.Civ.App. 1948); *Rook v. McCulloch County*, 326 S.W.2d 603 (Tex.Civ.App. 1959); *Neboc Land Co. v. City of Houston*, 342 S.W.2d 42 (Tex. Civ.App. 1961, error ref. n.r.e.); *Houston Pipe Line Co. v. Brown*, 361 S.W.2d 884 (Tex.Civ.App. 1962, error ref. n.r.e.).

And this is the majority rule in the United States:

18 Am.Jur. 1012-1016 (Em. Dom. #370-#372);
30 C. J. S. 6-19 (Em. Dom. #335-#342).

Nichols, *The Law of Eminent Domain*, 3rd Ed., Vol. VI, Pg. 189, Sect. #26.42.

See: Collation of Authorities, 121 A.L.R. 12, et seq.

There are circumstances, however, where this right may be forfeited. In *Barnidge v. United States*, 101 F.2d 295, 298, (C.C.A. 8, 1939), the federal rule was stated:

> "In fact, it has been held quite generally that where, as here, *possession of the property is not taken* at or prior to the institution of condemnation proceedings, the proceedings may be abandoned at any time before the actual acceptance of the property and payment therefor." (Emphasis added).

Texas, also, recognizes this limitation. The only reported Texas cases wherein the denial of dismissal was upheld are:

Brazos River Conservation & Reclamation District v. Allen, 141 Tex. 208, 171 S.W.2d 842 (Tex.Sup. 1943); *Thompson v. Janes*, 151 Tex. 495, 251 S.W.2d 953 (Tex. Sup. 1952); and *Casey v. State*, 331 S.W.2d 950 (Tex.Civ. App. 1959).

In *Thompson v. Janes*, supra, the Texas Supreme Court held, at page 955 (251 S.W.2d):

> ". . . petitioner acquired possession of the four acres at the outset of the suit under an agreement with respondents and has not offered to return possession to them . . . As a condition precedent to petitioner's right to dismissal, he must restore the status quo by

surrendering to respondents possession of the land sought to be dismissed . . .".

In *Casey v. State*, supra, it was held, at page 952 (331 S.W.2d):

> "Appellee . . . does not deny it had already taken possession of the property and constructed the highway thereon . . . the right to abandon the project of taking property in a condemnation case may be lost by taking possession of the property, which unquestionably was done in this case . . ."

Thus, it is held in the above two cases that the right of abandonment may be lost where possession is not relinquished by the condemnor and the status quo re-established.

Anent the restoration of the status quo, the Court is is referred to the very recent case of *Houston Pipe Line Co. v. Brown*, 361 S.W.2d 884 (Tex.Civ.App. 1962, error ref. n.r.e.), where a public utility with the right of eminent domain had trespassed on Brown's property. When Brown sought to enjoin, the utility filed a cross-action for condemnation as it was allowed to do under Article 3269, Vernon's Civil Statutes, Texas. The utility company considered the verdict excessive and offered to dig up its pipeline and restore the land to the condition it was in prior to the trespass. The Texas Court of Civil Appeals allowed the utility company so to do, holding, at page 884 (361 S.W.2d):

> "In the instant case *appellant did not take possession under or by virtue of the condemnation proceedings*, and it does not seek to relitigate the matter of damages. *It has offered* to remove the pipeline from the

> premises in question and *to restore possession to appellees*, and to submit to a mandatory injunction requiring it to do so, . . . *It does not appear, therefore, that appellees will be prejudiced in any way* by the court granting them the relief they prayed for in their petition in seeking a mandatory injunction against appellant." (Emphasis added) 361 S.W.2d 884, 887.

The *Brown* case is especially significant to a proper analysis of the case at bar. It being conceded that Respondent did not take subject property "under and by virtue of the condemnation proceedings", any other "possession" or "taking" of subject property (which, of course, is denied) would be extra-legal and thus would invoke the doctrine of *Brown*.

The other Texas case in which the Appellate Courts upheld the action of the Trial Court in denying dismissal of a condemnation case was *Brazos River Conservation & Reclamation District v. Allen*, 141 Tex. 208, 171 S.W.2d 842 (Tex.Sup. 1943). It was held, at page 884:

> "A condemnor has the right to correct its errors, to dismiss its proceedings for condemnation, to abandon the purpose of taking the land, but it may not exercise any of these rights to the *prejudice* of the landowner." (Emphasis added).

Thus, we now have two conditions which would preclude the right to dismiss:

> (1) Where possession and the status quo cannot be restored -- not applicable in the case at bar; and
>
> (2) Where the landowner would be "prejudiced" by the dismissal.

Obviously, the word "prejudiced" as used in *Allen,* supra, must have a circumscribed meaning in law, otherwise no suit could ever be dismissed, as a fruitless trip to the courthouse could be considered "prejudice" (in its broadest sense) to the landowner.

This word, in the context here used, as well as the meaning of the *Allen* case, supra, was explained by the Texas Supreme Court in *Lower Nueces River Water Supply District v. Cartwright,* 160 Tex. 239, 328 S.W.2d 752 (1959), at Page 757, where the Court held:

> ". . . However, when the condemning authority *gains possession of land under and by virtue of condemnation proceedings* (Emphasis, the Court's) and cannot thereafter restore possession to the landowner and thus re-establish the status quo, such authority cannot dismiss the condemnation proceedings under which possession was obtained and seek to relitigate the matter of damages. Such action would result in obvious prejudice to the landowner . . . *This is the prejudice to the landowner upon which the rule of Brazos River Conservation & Reclamation District v. Allen . . . is based . . .*" (Emphasis added).

Here, Respondent did not gain possession of the land under a condemnation proceeding and under Texas law Petitioners would not be prejudiced by a dismissal. Also, as previously mentioned, there is no question about restoration of the status quo, as it has not been disturbed. Hence, it is submitted that under Texas law there would be no impediment to dismissal, and, further, that the Texas law does not do violence to the United States Constitution, *Barnidge v. United States,* supra. Indeed, the Texas rule may be more zealous of the landowners rights than the federal rule.

> "It is settled that *the government may take possession in advance* of passing of title or *of abandonment of the condemnation proceeding.*" (Emphasis added). *Commercial Station Post Office v. United States*, 48 F.2d 183, 185 (C.C.A. 8, 1931).
>
> Also: *Moody v. Wickard*, 136 F.2d 801 (Ct.App. D.C., 1943).

III.

THREAT OF CONDEMNATION

In their "Statement of the Case", pages 7-9 of their Petition for Writ of Certiorari, Petitioners referred to statements of various witnesses, including Petitioner, Ross Biggers, to the effect that the witnesses, or their undisclosed principals, had evinced an interest in the subject property but since it was under the threat of condemnation no deal was made. In passing it should be pointed out that the Texas Court of Civil Appeals which had the entire record in this case before it, stated:

> "It would be purely speculative to say that Appellees were deprived of any sale by interference with the right to negotiate—There is nothing to suggest an agreement would have probably been reached between Appellees and a prospective purchaser. In the absence of such, we are unable to see how any damage could be shown with any certainty. . ."
>
> (Page 48, Petition for Writ of Certiorari); 380 S.W.2d 705.

Notwithstanding, Petitioners ask that United States Supreme Court hold that the alleged facts constituted a "taking" of their property, and since it was thus "taken" a condemnation suit could not be dismissed.

The United States Supreme Court held in, *Peabody v. United States*, 231 U.S. 530, 34 S.Ct. 159 (1913):

> "*Land*, or an interest in land, *cannot be deemed to be taken* by the government merely because it is suitable to be used in connection with an adjoining tract which the government has acquired, or *because of a depreciation in its value, due to the apprehension of such use.*" (Emphasis added).

That doctrine is still followed by the federal courts. In *Government of Virgin Islands v. 50.05 Acres of Land*, 185 F.Supp. 495, 498 (D.C. Virgin Islands, 1960) it was held:

> "The Court has not overlooked an additional objection made by certain defendants that under the statutory scheme for condemnation there has already been an uncompensated taking of property in this case. The reasoning seems to be that the very filing of this suit interferes with the normal freedom of an owner to use and dispose of his property. But such interference is inherent in all condemnation proceedings. No case has been cited or found which supports the view that the condemnation action itself constitutes a taking. The court finds no merit in it."

A landmark Texas case, *State v. Delesdenier*, 7 Tex. 76 (Tex. Sup. 1851) stated that everyone held his property subject to the right of the state to condemn it. In *State v. Vaughan*, 319 S.W.2d 349 (Tex.Civ.App. 1958), it was held:

> "The mere fact that tenants learn of contemplated condemnation and because of such information elect to vacate the property does not afford the owner the right to recover damages from the State because there

> has been neither a taking or any character of a physical invasion of the property. Indeed the condemnation may be completely abandoned and the property never taken . . . The loss of tenants and the resulting loss of rentals was, in any event, incidental or consequential to the taking of the entire property by the State for which reason the State is not liable for such consequential damage . . . Moreover prior to March 25, 1958, there is no showing of any physical invasion or appropriation of the property and therefore no prior taking shown . . .".

It is submitted, therefore, that the Sword of Damocles presented to Petitioners by the threat of condemnation was not a "taking" of their property in any sense, and certainly not a taking under the laws of eminent domain, hence the right to dismiss condemnation proceedings has not been forfeited thereby.

IV.

CIVIC CENTER ORDINANCE

Petitioners contend that Civic Center Ordinance No. 58-1033 was invalid and unconstitutional, but that, somehow, notwithstanding its invalidity and unconstitutionality, it "took" their property,—in effect worked an inverse condemnation,—and the property having been "taken" thereby, Respondents could not dismiss the condemnation suit.

Needless to say, none of the cases they rely on are in point or support this proposition—most of the cases are suits for mandamus to compel the issuance of a building permit or in injunction to prevent the enforcement of a restrictive ordinance. The Texas Court of Civil Appeals, in their opinion sought here to be reviewed, held

that, "If appellees had desired to do so (i.e. build) they had their remedy, in spite of the ordinance by mandamus." 380 S.W.2d 705, Petitioners' Petition for Writ of Certiorari, p. 48, L 1-2.

The federal courts have consistently held that the mere enactment of legislation preparatory to, or authorizing, condemnation, is not a "taking" of property:

In *Danforth v. United States*, 308 U.S. 271, 60 S.Ct. 231 (1939) the United States Supreme Court held:

> "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership — they cannot be considered as a 'taking' in the constitutional sense." 308 U.S. 286, 60 S.Ct. 237.
>
> * * * *
>
> "The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail."

In *Beistline v. City of San Diego*, 256 F.2d 421, [C.C.A. 9, 1958, Cert. Den. 358 U.S. 865, 79 S.Ct. 96 (1958)], the Ninth Circuit held:

> "The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property."

In *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex. Civ.App. 1959, error ref. n.r.e., Cert. Den. 364 U.S. 474, 81 S.Ct. 242), the Texas Courts (and the United States

Supreme Court on Petition for Writ of Certiorari) had for consideration a case where the City of Houston had refused Plaintiff Kirschke a building permit. It should be noted, in passing, that even though Petitioners here had never even applied for a building permit, if they had done so, the most that could have happened would have been a denial of the permit and they would have been in the same situation as Kirschke.

Kirschke sued the City of Houston for damages allegedly resulting to him as a result of the denial of this permit, which, it was claimed, "took" his property contrary to the Texas Constitution and the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Although the term was not mentioned in words, the theory of the lawsuit was evidently in the nature of an inverse condemnation.

The Texas Court of Civil Appeals held that there was no "taking" in the constitutional sense because:

> "There had been no actual or partial taking of appellants' property, nor any physical invasion or appropriation thereof or physical damage thereto." 330 S.W.2d 632.
>
> * * * *
>
> "Appellants insist, however, that the wrongful exercise of the police power in this case has resulted in the taking or damaging of their property, for which they should be permitted to recover adequate compensation. The answer to their contention is that the action of the City has not progressed to the point where there has been any taking or damaging of property within the purview of either the State or Federal constitutions, since up to this time the City has merely refused to grant a building permit." 330 S.W.2d 634.
>
> * * * *

> "They were still free to make the desired improvements without a permit under the facts pleaded or to force the issuance of such permit. Instead of doing so, they waited for some time and then chose the wrong remedy." 330 S.W.2d 634.

Our sister states follow the federal and Texas rule holding that taking or damaging of land by eminent domain is not accomplished by passing of resolutions or ordinances in anticipation of future acquisition: *Eckhoff v. Forest Preserve Dist.*, 36 N.E.2d 245 (Ill. Sup. 1941); *In re City of Pittsburgh*, 90 Atl. 329 (Penn. Sup. 1914); *Hamer v. State Highway Commission of Missouri*, 304 S.W.2d 869 (Mo. Sup. Div. 2, 1957); *Scorbino v. New Brunswick*, 129 A.2d 473 (N.J. Super 1957); *United States v. Sponenberger*, 308 U.S. 256 (1939); *Willink v. United States*, 240 U.S. 572 (1916); *Chicago Housing Authority v. Lamar*, 172 N.E.2d 790 (Ill. Sup. 1961): *State v. Appleton*, 294 N.W. 418 (Minn. Sup. 1940); *23 Tracts of Land, etc. v. United States*, 177 F.2d 967 (C.C.A. 5th 1949); *General Finance Corp. v. Archetto*, 176 A.2d 73 (R.I. Sup. 1961); *Ruddock v. American Medical Assn.*, 112 N.E.2d 107 (Ill. Sup. 1953); *Baaken v. State*, 382 P.2d 550 (Mont. Sup. 1963); *Moser v. City of Phoenix*, 7 P.2d 622, 627 (Ariz. Sup. 1932); *18 Am. Jur.* 771 (Em. Dom. #144).

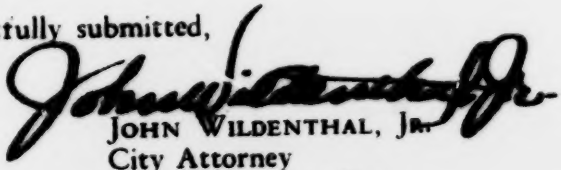
The ordinance is either valid or invalid. If it is valid, it is a proper use of legislative and police power for which Respondent, of course, would not be liable. 63 C.J.S. 37 (Mun. Corp. #749); *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 233 S.W.2d 286 (Tex.Sup. 1950).

If the ordinance is invalid, nonetheless its passage was a governmental act or function of Respondent City for which it is not liable in damages. *Tillman v. District of*

Columbia, 29 F.2d 442 (Ct.App. D.C. 1928); *Ellis v. City of West University Place*, 141 Tex. 608, 175 S.W.2d 396 (Tex.Sup. 1943); *Kirschke v. City of Houston*, supra, nor would it lose the valuable substantive right of dismissal of a condemnation suit thereby; for, it would be tantamount to collecting damages from Respondent to force an inverse condemnation upon it and require public tax moneys to be spent to pay a price for land its governing body considers excessive.

WHEREFORE, Respondent prays that Petitioners' Petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent, City of Houston, in Oppcsition to Petition for Writ of Certiorari has been served upon Hon. Fentress Bracewell, and Hon. William H. White, Counsel for Petitioners, 1808 First City National Bank Building, Houston, Texas, 77002, by placing same in the United States mail, postage prepaid, on this 5 day of March, 1968.

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